

## Brigham Young University Law School BYU Law Digital Commons

---

### Utah Supreme Court Briefs (1965 –)

---

1976

# State of Utah v. Lawrence H. Allmendinger : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Vernon B. Romney; William W. Barrett; Attorneys for Respondent;

Larry R. Keller; Attorney for Appellant;

---

### Recommended Citation

Brief of Respondent, *State v. Allmendinger*, No. 14582 (Utah Supreme Court, 1976).

[https://digitalcommons.law.byu.edu/uofu\\_sc2/337](https://digitalcommons.law.byu.edu/uofu_sc2/337)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE  
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LAWRENCE H. ALLMENDINGER,

Defendant-Appellant.

Case No.  
14582

BRIEF OF RESPONDENT

APPEAL FROM THE THIRD JUDICIAL DISTRICT  
COURT IN AND FOR SALT LAKE COUNTY, STATE  
OF UTAH, THE HONORABLE BRYANT H. CROFT,  
JUDGE, PRESIDING

VERNON B. ROMNEY  
Attorney General

WILLIAM W. BARRETT  
Assistant Attorney General

236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Respondent

LARRY R. KELLER

Salt Lake Legal Defender Association  
343 South Sixth East  
Salt Lake City, Utah 84102

Attorney for Appellant

FILED

AUG 25 1976

# TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIABLE SOURCE ON APPEAL-----	2
STATEMENT OF FACTS-----	2
ARGUMENT	
POINT I: THE TRIAL COURT ACTED WELL WITHIN STATUTORILY PRESCRIBED DISCRETION IN PLACING APPELLANT ON PROBATION FOR A YEAR-----	2
POINT II: THE UTAH LEGISLATURE DID NOT INTEND THAT PROBATION BE LIMITED BY SENTENCE PRO- VISIONS-----	13
CONCLUSION-----	15

## CASES CITED

Application of Young, 201 Kan. 140, 439 P.2d -----	11
People v. [illegible], 9 Okla. Crim. 273, 233 P.781 -----	12
People v. [illegible], 73 Idaho 474, 253 P.2d 794 (1953)--- -----	11,12
People v. [illegible], 395 U.S. 147 23 L.Ed.2d -----	6
People v. [illegible], 1901 (1909)-----	14
People v. [illegible], 176 Cal.2d 376, 339 P.2d 202 (1959)-----	12
People v. [illegible], 72 Cal. Rptr. 457, 266 C.A.2d 754 (1968)-----	5,12
State v. [illegible], 86 N.W. 71, 519 P.2d 307 (1974)-----	13
State v. [illegible], 86 Idaho 353, 381 P.2d 350 (1969)-----	11,12

ordered to show cause as to why probation should not be revoked. Appellant moved to dismiss the Order to Show Cause on the grounds that the court lost jurisdiction over appellant after six months, which is the maximum sentence for possession. The Court denied the Motion.

#### RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the decision of the lower court.

#### STATEMENT OF FACTS

(See Disposition in the Lower Court)

#### ARGUMENT

##### POINT I

THE TRIAL COURT ACTED WELL WITHIN STATUTORILY PRESCRIBED LIMITS IN PLACING APPELLANT ON PROBATION FOR A YEAR.

Appellant contends that there is no statutory authority for extending probation beyond the maximum time prescribed by the legislature for imprisonment for an offense. Respondent replies that the Utah Code specifically provides for extensions of probation beyond maximum imprisonment limits. Furthermore, the Utah statute is very similar to most other state and federal statutes in this respect. The Utah law also parallels standards suggested by the

American Bar Association and the Model Penal Code. Finally, respondent submits that several very important policy considerations are satisfied by the Utah statute. Therefore, respondent asks this Court to affirm the decision of the district court.

Contrary to appellant's assertion that there is no authority for extending a probation period beyond a maximum prison sentence, the Utah Code Annotated, § 77-35-17 (1953) reads:

"Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition of the execution of sentence and may place the defendant on probation for such period of time as the court shall determine.

The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation." (Emphasis added)

Another section of the Utah Code, § 58-37-8(10), which deals with penalties for possessing marijuana, among other things, provides that the court may place a defendant on probation upon "any reasonable terms and conditions as may be required." Obviously, the legislature intended to give the courts a great deal of discretion in granting probation. Through these provisions the legislature provides all-

important flexibility in the administration of this humane prerogative. The court may set the duration of probation and also modify any conditions thereof. This is consistent with the overall policy of the Utah Criminal Code as expressed in Utah Code Annotated § 76-1-104 (as amended 1975):

"The provisions of this code shall be construed in accordance with these general principles: . . . (3) prescribe penalties. . . which permit recognition of difference in rehabilitation possibilities among individual offenders." (Emphasis added)

As will be demonstrated, *infra* p. 7 , there are many important reasons for a court to have broad discretion when dealing with so many different people. Numerous other states recognize this need, as their code provisions demonstrate.

Courts in Colorado, like Utah, may grant probation for whatever period as they deem best (C.R.S. § 16-11-202). Other states allow the trial court to set probation within some outside limit that has nothing to do with the possible incarceration limits. In Nevada, for example, probation may be extended for as long as five years (NRS 176.215). Hawaii, like Nevada places no less than a five year limit on probation, even for

misdemeanors (HRS, § 711-77). Oklahoma permits probation to extend up to two years (OSA 22 § 991c).

Some states have different probation period limitations depending on whether the defendant was convicted of a felony or a misdemeanor. Kansas specifies five years for felonies and two years for misdemeanors. Furthermore, felony probation may be later extended five additional years and misdemeanor probation two. The statute, however, goes on to provide that, in any case, felony probation can not be extended past the sentence limit (KSA 21-4611). Obviously the same is not true for misdemeanors. In Kansas a misdemeanant may receive only a year's incarceration (KSA 21-4502). Therefore, in Kansas, a misdemeanant may be placed on probation for up to four times (2 years original and two years extension) and still not reach the maximum sentence limit.

California is similar to that in Kansas. A misdemeanant may be placed on probation for up to two years (IC 19-2601(7)) although the maximum sentence is six months imprisonment (IC 18-113). California goes even further. In that state a misdemeanant who could only be incarcerated for 90 days may be placed on probation for as long as three years (California Penal Code, § 1203a) and People v. Heath, 72 Cal. Rptr. 457 (1968)).

Oregon has an interesting statute. In that state, a defendant may not be placed on probation for less than a year (ORS 137.010). Obviously the Oregon legislature feels that probation for less than a year is ineffective.

Of all the western states<sup>1</sup> only Arizona, New Mexico and Washington restrict probation by the maximum length of sentence (ARS 13-1657, NMSA 40A-29-19 and RCW 9.95.200).

Federal statutes (18 USC § 3651) provide for an extended probation period and have been supported by the United States Supreme Court in a line of cases, primary of which is Frank v. United States, 395 U.S. 147, 23 L.Ed.2d 162, 89 S.Ct. 1503 (1969). In Frank, Mr. Justice Marshall said, for the Court:

Federal and state courts do not allow significant probation to be imposed for otherwise petty offenses. For example, under federal law, most offenders may be placed on probation for up to five years in lieu of or, in certain cases, in addition to a term of imprisonment.

\* \* \*

Therefore, the maximum penalty authorized in petty offense cases

---

<sup>1</sup> Includes Hawaii, Washington, Oregon, California, Idaho, Utah, Nevada, Arizona, Montana, Wyoming, Colorado, New Mexico, Kansas and Oklahoma.



is not simply six months imprisonment and a \$500.00 fine. A petty offender may be placed on probation for up to five years and if the terms of probation are violated, he may then be imprisoned for six months."

Finally the American Bar Association has set forth similar guidelines in its Standards for Criminal Justice. The American Bar Association suggests two years probation for a misdemeanor and up to five for a felony (Standards, p. 21 Probation). The committee adds the opinion that the limits on the length of a sentence to probation should be determined independently of the appropriate length of a prison sentence for the same offense (Standards, p. 26).

There are many good policy reasons for allowing a trial judge the discretion to extend probation for a reasonable length of time even if it may be for longer than the maximum possible sentence. In his Memorandum Decision Judge Croft of the lower court listed two strong reasons in support of probation extension. First under Utah law some jail sentences cannot exceed 90 days, as for a Class C misdemeanor (Section 76-3-204(3)). A probationary period of such limited duration hardly serves any useful purpose. As Judge Croft pointed out:

"It is misdemeanor type offenses where probation is usually indicated rather than a jail sentence, but if the supervision of such a wrongdoer is to be limited to the maximum jail sentence that can be served, probation in such cases becomes only a gesture. . . ." (R-76)

Judge Croft goes on to say:

". . . the court, when given the alternative of a short jail sentence or a short and thus useless probation period, may well start imposing jail sentences in those cases where proper probation supervision, if available, may well steer a defendant away from further criminal activity." (Id.)

Judge Croft points out a second good reason for an extended probation period:

"The second reason why I do not believe the law should or does require the limitation of a probation period as contended by defendant is that, as in the case at bar, defendants in most cases, through various motions, end up pleading to a lesser included offense, frequently doing so in the belief that a plea to the lesser offense may more likely result in consideration for probation. If courts are to be limited to a brief probation period, courts are then placed in the position of either denying the plea to a lesser included offense, or using jail sentences as the only reasonable sentence remaining open to the court. . . ." (R-76)

Probation is an attempt to give first offenders and some others a chance to demonstrate their capacity to

overcome their errors. Another reason for an extension of this program may be demonstrated by a hypothetical case. The accused is convicted and sentenced to probation and payment of a fine as provided by Utah Code Annotated § 77-35-17 (1953, as amended). Suppose the crime was a misdemeanor with a penalty of six months in jail. Further suppose the convicted man was unable to pay the fine within the six months. Under the law, as appellant would have it, the man would have to be thrown in jail. The more humane view would be to allow the trial judge the discretion to extend probation beyond the six months and give the man some additional time to make good his debt.

Respondent strongly urges this court to affirm the decision of the lower court. Appellant would seek to apply very rigid standards in an area that has a special need for discretion. A judge, viewing the defendant face to face, hearing discussion from both sides concerning the defendant, and receiving reports from adult probation and parole is in a much better position to evaluate the needs of an individual than is the legislature. The legislature realized all this and thus specifically and unequivocally endowed the trial court with broad discretion which respondent asks this court to sustain.

Appellant alleges that there is ample authority for his position that probation should be limited by statutory sentencing provisions. Respondent answers that most of appellant's proffered authority is misapplied and inapplicable to the instant question. The remainder simply demonstrates the minority view.

Appellant said the general rule is stated in 21 Am. Jur. 2d Criminal Law, § 555 (p.4 of Appellant's brief).

"Where the suspension of imposition of sentence is authorized, the court . . . may, after such suspension, pronounce sentence at any time provided the maximum period for which sentence could have been imposed or probation granted has not elapsed."

A close reading of the rule, however, and of the case cited as supporting the rule demonstrate that ". . . maximum period . . . sentence could have been imposed . . ." means the statutory period after conviction in which the court must pronounce sentence. It has absolutely nothing to do with the sentence actually imposed or maximum possible sentences. In other words, the rule simply states that a court can't wait forever to impose some kind of sentence, whether it is imprisonment or probation. The rule has nothing to do with how long probation may continue if it is imposed.

On page six of his brief appellant cites In re Carroll, a Kansas case, as authority for his position. Respondent has already shown that Kansas law allows probation to continue for up to four times the maximum incarceration period in the case of a misdemeanor. If Carroll were still good law there would be a contradiction. Carroll, however, is a 1914 case and has long since been overturned by legislative action. In Application of Young, 201 Kan. 140, 439 P.2d 142 (1968), the Supreme Court of Kansas explains:

"The parole authority of a police court was considered in Carroll. The statute then in effect (Laws of 1909, Chap. 116, Sec. 2) was examined and since it provided no limit on the term of a parole granted thereunder, this court held that a police court had no power to grant a parole for a term longer than the sentence imposed. . . . The statute amended in 1917. . . under which a police court is specifically authorized to grant a parole for a term extending beyond the sentence. . .

\* \* \*

The language of K.S.A. 20-2312 is plain and unambiguous. . . . The statute supercedes any case law pertaining to the subject. (43P P.2d at 143, 145)

Appellant relies heavily on Idaho cases in his argument, particular State v. Sandoval, 92 Idaho 853, 452 P.2d 350 (1969), and Ex Parte Medley, 73 Idaho

474, 253 P.2d 794 (1953). Respondent contends that neither case applies here. In Idaho, although probation can be four times longer than imprisonment for a misdemeanor, the rule is different for felonies where probation is limited by the maximum period of incarceration. Both the Sandoval and Medley decisions involve felony convictions and not a misdemeanor conviction as in the instant case. Obviously therefore, neither case is authority for appellant's position.

Appellant further cites the Oklahoma case of Ex Parte Eaton, 29 Okla. Crim. 275, 233 P.781 (1925). Suffice it to say that the pertinent Oklahoma statute has been revised. Subsequent to 1970 the law in Oklahoma is that a probation period may be for as long as two years (OSA 22 § 991c (1970)).

People v. [illegible], 170 Ca.2d 596, 339 P.2d 202 (1959), a California case, is also unavailable to appellant as authority. That case simply states that if no probation period is specified by the judge, the maximum prison term becomes the period of probation. It does not stand for the proposition, as implied by appellant, that probation could not be longer. In fact, the California courts have upheld a three year probation period in a case where the maximum sentence was 90 days. (People v. Heath, 72 Cal. Rptr. 457, 266 C.A.2d 754 (1968)).

The only other authority cited by appellant is State v. Lard, 86 N.M. 71, 519 P.2d 307 (1974). Respondent admits that in New Mexico a convicted person may not be placed on probation for a longer period than he may be imprisoned. However, respondent points out that New Mexico along with Arizona and Washington are the only three (out of fourteen) western states that so hold. Respondent submits that Utah should maintain its position among those states that espouse the majority view.

Appellant is correct, in his report of the case law on the subject, that when the trial court fails to specify the period of probation it is generally held to be the same as the maximum sentence period. This is not a case, however, of an unspecified probation period. The trial court very specifically sentenced appellant to one year probation. Thereafter appellant very specifically accepted that sentence.

#### POINT II

THE UTAH LEGISLATURE DID NOT INTEND THAT PROBATION BE LIMITED BY SENTENCE PROVISIONS.

In his second argument appellant goes to great and imaginative lengths in attempting to prove that the Utah legislature, although not specifically so stating, meant for probation periods to be limited by the incarceration provisions of the Code. Respondent submits that a

simple reading of the statute is more than sufficient to convey the legislative intent. As shown, supra, the Utah legislature very clearly, and with great supporting intent, meant for trial judges to have wide discretion in probation matters. In interpreting statutes the court should assume that each word of a statute was used advisedly and should be given application in accord with their usually accepted meaning (Grant v. Utah State Land Board, 26 Utah 2d 100, 485 P.2d 1035 (1971)). Respondent submits that the following words are very clear:

"Upon a plea of guilty or conviction. . . the Court having jurisdiction. . . may place the defendant on probation for such period of time as the court shall determine." (Utah Code Annotated § 77-35-17 (1953))  
(Emphasis added)

Respondent argues that probation is a penalty and not a privilege. This is exactly backwards of the truth. When a man commits a crime and is adjudged to be guilty he can be sentenced to serve a time in jail or prison. That would be the penalty for his actions. Thereafter, as a privilege, granted for whatever humane reasons, the court may allow that man to be placed on probation in lieu of incarceration. Furthermore, respondent asks this court to take judicial notice that any reasonable



man would prefer as much as three years probation to one year in prison confinement. Obviously appellant feels this way since he choose, voluntarily and of his own accord, one year's probation rather than six months in jail.

Finally, appellant argues that a defendant has certain rights while on probation. Respondent stipulates as much. However, all of the "forward looking due process concepts" under Morrissey v. Brewer and all other cases cited by appellant, have absolutely nothing to do with the length of probation. This is not a case where the issue is a revocation hearing, notice, speedy trial, written findings, or any of the other Morrissey requirements. The Utah legislature may make the law on length of probation and they have wisely chosen to grant the judge the discretion to solve that problem.

#### CONCLUSION

Since there is specific statutory authority supporting the decision of the lower court, and since Utah's statutes are very similar to those of most other states, respondent urges this court to affirm the decision of the lower court. Such affirmation would carry out the intent of the legislature of Utah.

Respectfully submitted,

VERNON B. ROMNEY  
Attorney General

WILLIAM W. BARRETT  
Assistant Attorney General